

U.S. Department of Labor

Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, VA 23606-1904

(757) 873-3099
(757) 873-3634 (FAX)



Issue date: 07Jun2002

Case No.: 2001-LHC-1589

OWCP No.: 5-110168

In the Matter of:

BENJAMIN M. GOODE
Claimant,

v.

CARGILL, INC.,
Employer.

Appearances:

John H. Klein, Esq.
For Claimant

Dana Adler Rosen, Esq.
For Employer

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act (the "Act"), as amended, 33 U.S.C. §§ 901 *et seq.* A formal hearing was held on December 3, 2001 in Newport News, Virginia. Benjamin M. Goode ("Claimant") offered exhibits CX 1 through CX 6, Cargill, Inc. ("Employer") offered exhibits EX 1 through EX 12, and both parties offered joint

exhibits JX 1 through JX 4.¹ The exhibits were admitted into evidence without objection. Both parties submitted post-hearing briefs.

Stipulations

Employer and Claimant submitted the following stipulations:

1. That an employer/employee relationship existed on May 21, 1999.
2. That the parties are subject to the jurisdiction of the Act.
3. That a claim for compensation was filed on September 22, 2000.
4. That Claimant has an average weekly wage of \$556.57 with a compensation rate of \$371.05.

(JX 4).

5. Barbara Byers is qualified to offer an expert opinion in the field of vocations.

(Tr. 19).

Issues

1. Whether Claimant filed a timely claim for compensation.
2. Whether Claimant's injury is work-related.
3. Whether Claimant is temporarily and totally disabled.

Findings of Fact and Conclusions of Law

Claimant was thirty-three years old at the time of the hearing. (Tr. 19). Prior to his work accident, Claimant had been in good health, and although a cigarette smoker, had no known lung

¹The following abbreviations will be used as citations to the record:

CX - Claimant's Exhibit

EX - Employer's Exhibit

JX - Joint Exhibit

Tr - Transcript

Dr. Donlan's Dep.-Deposition transcript of Dr. Charles J. Donlan

problems. (Tr. 35, 50, EX 2).² Claimant underwent a pre-employment physical with Employer and was found not to have any pre-existing disabilities. (Tr. 35).

Claimant worked for approximately five years at Employer's grain transportation facilities. (Tr. 19-20). Employed as an elevator and a dryer man, Claimant primarily was responsible for loading and unloading grain on barges and tanks. Claimant's work required him to drive tractors, push wheel barrows, and manually shovel grain. (Tr. 19-20). These activities involved climbing and occasional lifting up to fifty pounds. (Tr. 23). Claimant typically worked an eight hour shift. (Tr. 20). Working on barges made it difficult to take breaks. (Tr. 25-27). Going to the bathroom involved traveling several hundred feet through a series of hatches. (Tr. 25-27). Due to the dangers of operating without a full crew, bathroom breaks would result in a complete stop in production. (Tr. 22-27).

Claimant's work environment contained dust and fumes. (Tr. 31, 32, 38, 41, 42). The grain itself produced a large amount of dust. (Tr. 38). In addition, the grain was regularly fumigated with pesticides to kill insects which might be present. (Tr. 31). During the actual fumigation process, workers were kept out of the tanks and only after the air had been tested were workers allowed to enter the fumigated facilities. (Tr. 32). Workers also carried into the tanks monitors designed to alert them of dangerous air conditions. (Tr. 32). Workers frequently wore respirators, although practical considerations of the job made it difficult for the workers to keep them on at all times, and even with the respirators on, workers still breathed in dust. (Tr. 41, 42).

On December 23, 1998, Claimant was involved in an accident while at work for Employer. (Tr. 30-31). That day, Claimant and his crew members attempted to get a sample of grain from a tank. (Tr. 31). Prior to entering the tank, Claimant could still smell the pesticides that had been sprayed inside. (Tr. 32). Once Claimant was twenty to forty feet inside the tank, all three of the alarms went off, including the chemical hazard and the carbon monoxide alarm. (Tr. 32). The foreman ordered Claimant's crew out of the tank and Claimant vomited immediately after exiting the tank. (Tr. 32, 33). According to Claimant, his fellow crew members complained of immediate physical symptoms following the incident, but he did not know whether any of his crew members had any later problems. (Tr. 33, 47, EX 9 at 26). The foreman advised the crew to clean up, drink some water, and retire to the locker room for the remainder of the shift. (Tr. 33).

Over the next month, Claimant continued to feel sick, complaining of stomach pains, nausea, loss of appetite, and frequent bowel movements. (Tr. 33-34, EX 2). About three weeks after the accident, Claimant sought treatment from his family doctor, Dr. Francisco Espada M.D. (Tr. 33, CX 1). Initially, Claimant did not tell Dr. Espada about the incident at work because Claimant believed

² After graduating from high-school, Claimant joined the Army, eventually serving in Desert Storm in Saudi Arabia. (Tr. 19, 44). Following his service, Claimant received a letter from the Veteran's Administration that discussed Claimant's possible exposure to chemicals while in the field. (Tr. 45). There is no evidence, however, that would support a finding that Claimant was actually exposed to any chemicals during military service, nor does this letter allow an inference that Claimant's sarcoidosis is related to his military service.

he was suffering from a stomach virus. (Tr. 33-34).³ Based on numerous visits, Dr. Espada observed such symptoms as poor appetite, joint pain, and extreme fatigue. (CX 1). The chronic nature of these symptoms also led to the onset of acute depression. (CX 1).

Over the course of the spring, Claimant's symptoms worsened and he began to work less frequently. (Tr. 34). Claimant had difficulty eating and would frequently vomit, quickly losing over fifty pounds. (Tr. 29-30). Claimant did not have a bowel movement for four and one half months. (Tr. 30). Claimant had aches in his joints and other parts of his body and he suffered from headaches. (Tr. 30). In addition, Claimant had difficulty breathing, feeling winded after short climbs. (Tr. 30). On May 4, 1999, Claimant stopped working and he has not worked since. (Tr. 27, 29).

Based on an abnormal chest x-ray, Dr. Espada referred Claimant to Dr. Charles J. Donlan. (Dr. Donlan's Dep. at 4).⁴ Dr. Donlan is board certified in internal medicine and pulmonary medicine. (Dr. Donlan's Dep. at 4). Dr. Donlan examined Claimant for the first time on May 7, 1999. Claimant's chest x-ray showed bilateral hilar and right paratracheal adenopathy, which appeared to be sarcoidosis. (Dr. Donlan's Dep. at 4). Based on Claimant's symptoms, health history, and x-ray results, Dr. Donlan ordered a variety of additional diagnostic tests, including a fiberoptic bronchoscopy, a transbronchial lung biopsy, and several pulmonary function tests. (EX 2). Based on the test results, Dr. Donlan diagnosed Claimant with sarcoidosis. (Dr. Donlan's Dep. at 4).

Sarcoidosis is a systemic disorder, marked by the presence of granulomatous tissue, primarily affecting the lung and lymphatic systems of the body. (EX 3 at 736).⁵ This disorder may involve several organs and can present itself in many different ways. (EX 3 at 741). The cause of this disorder is unknown. (EX 3 at 736). Some medical evidence, however, supports the idea that sarcoidosis results from "exposure of genetically susceptible hosts to specific environmental agents." (EX 3 at 738).⁶ Swedes, Danes, and U.S. Blacks have the highest prevalence rates in the world. (EX

³ Claimant suffered from the flu during January, but his illness resolved. (EX 2).

⁴ The record was left open at the hearing for receipt of Dr. Donlan's deposition transcript. Dr. Donlan's deposition was taken on November 26, 2001.

⁵ The American Thoracic Society supplies a medical definition of sarcoidosis:

Sarcoidosis is a multisystem disorder of unknown causes. It commonly affects young and middle-aged adults and frequently presents with bilateral hilar lymphadenopathy, pulmonary infiltration, and ocular and skin lesions. The liver, spleen, lymph nodes, salivary glands, heart, nervous system, muscles, bones, and other organs may also be involved The diagnosis is established when clinicoradiological findings are supported by histological evidence of noncaseating epithelioid cell granulomas.

(EX 3 at 736). The American Thoracic Society Medical Section of the American Lung Association Joint Statement on Sarcoidosis provides an authoritative statement on sarcoidosis. (Dr. Donlan's Dep. at 10).

⁶ Claimant's uncle was also diagnosed with sarcoidosis. (Tr. 36).

3 at 738).⁷ The list of suggested possible causative agents includes aluminum, zirconium, talc, pine tree pollen, clay, and several viruses and bacteria. (EX 3 at 739). As of yet, however, no study has confirmed that any of these agents cause sarcoidosis.⁸

Based on the diagnosis of sarcoidosis, Dr. Donlan prescribed to Claimant the steroid Prednison. (EX 2). Claimant continued to see Dr. Donlan up until November 16, 2001, and he was treated by several additional doctors during this period.

The first of these doctors, internal physician and pulmonary specialist Dr. James R. Tomlinson, examined Claimant on August 16, 1999. (CX 5). Dr. Tomlinson noted an impression of probable sarcoidosis and that Claimant seemed to be responding favorably to steroid treatments. (CX 5). Observing that nothing in Claimant's social history indicated that Claimant should be disabled, Dr. Tomlinson refused to fill out Claimant's disability paperwork. (CX 5). Dr. Tomlinson nevertheless recommended that Claimant avoid dusty environments because of his lung disease. (CX 5).

Beginning July 24, 2000, Claimant began treatment with pulmonary specialist Dr. Vandana A. Patel. (CX 4). During this first visit, Claimant complained of fatigue, shortness of breath, stomach cramps and wheezing. (CX 4). Upon examination, however, Dr. Patel found that Claimant's chest produced no audible wheezing, equal breath sounds, and good excursion. (CX 4). Pulmonary function tests revealed a mildly reduced capacity and normal flow in Claimant's lungs. (CX 4). Following this visit, Dr. Patel was uncertain whether further steroid treatment was recommended, but Dr. Patel considered prescribing an inhaled anti-inflammatory agent, and for treatment of Claimant's wheezing symptoms, Dr. Patel prescribed a bronchodilator inhaler. (CX 4). Dr. Patel ordered further pulmonary function tests which were later performed by Dr. Larry J. Quate. (CX 4). Dr. Quate's impression was that "[m]ild restrictive lung disease is present. No obstructive disease is noted. These findings could be consistent with the diagnosis of sarcoidosis." (CX 4).

On August 1, 2000, after reviewing the pulmonary tests results, Dr. Patel concluded that Claimant did not have "any significant pulmonary symptoms." (CX 4). Notably, Claimant also did not report any pulmonary symptoms during this visit. (CX 4). At this point, Dr. Patel advised against using steroids for his lung function, but deferred the decision to use steroids for digestive symptoms to a gastroenterologist. (CX 4). On March 22, 2001, Dr. Patel again examined Claimant. (CX 4). Claimant reported weight loss, problems holding down his food, muscle cramps, and general pain. (CX 4). Claimant also complained of shortness of breath and occasional chest discomfort, but no

⁷Claimant is African-American. (Tr. 50).

⁸Epidemiological research has "suggested person-to-person transmission or shared exposure to an environmental agent." (EX 3 at 738). Lung diseases with similar features to sarcoidosis have been linked to exposure to metal dusts, fumes, and organic antigens. (EX 3 at 738). Some studies have found clusters of sarcoidosis cases among groups of firefighters, U.S. Navy personnel, and health care workers. (EX 3 at 738). This association, however, may reflect increased detection rates among the groups, owing to the more frequent use of routine chest radiographs. (EX 3 at 738). So far, no studies have proven any of these hypotheses to a reasonable degree of medical certainty and the cause of sarcoidosis remains unknown. (EX 3 at 738).

coughing or wheezing. (CX 4). Dr. Patel's impression was "sarcoidosis with multiple systemic symptoms predominantly [gastrointestinal]." (CX 4). Dr. Patel again declined to prescribe steroids for the treatment of pulmonary symptoms. (CX 4).

Indeed, over the course of his treatment, Claimant's pulmonary symptoms were intermittent and only minimally quantifiable. A review of the medical evidence reveals that, in May 1999, Dr. Donlan found the results of Claimant's pulmonary tests to be "essentially normal," and all of Dr. Donlan's subsequent examinations revealed a clear chest. (EX 2). On July 4, 1999, however, Dr. Espada noted that Claimant was "coughing more." (EX 4). Dr. Espada's explanation was that this was either bronchitis or "a worsening of the sarcoidosis." (EX 4). Dr. Donlan's office notes of July 19, 1999, indicated that Claimant complained of shortness of breath. (EX 2). Dr. Donlan's office notes of August 20, 1999, however, indicated that Claimant no longer complained of shortness of breath and that Claimant was not experiencing chest pain. (EX 2). By letter dated December 8, 1999, Dr. Espada described Claimant's treatment with Dr. Donlan as required due to Claimant's "constant shortness of breath along with his lung problems." (EX 4). By letter dated October 21, 1999, Dr. Espada concluded that it was in Claimant's "best interest not to return to a job with a lot of dust and fumes because of his continuous symptoms." (EX 4). Finally, Dr. Donlan's office notes from November 16, 2001 record that Claimant continued to be "short of breath at times with activity." (EX 2).

Claimant's doctors shed some light on the possible connection between Claimant's pulmonary symptoms and his work environment. Dr. Donlan stated that it is "not probable that the [work] exposure caused the sarcoid." (Dr. Donlan's Dep. at 14). Dr. Donlan could not refer to a previous x-ray, however, and so could not confirm whether Claimant's lung abnormalities existed prior to the work accident. (Dr. Donlan's Dep. at 5). Nevertheless, Dr. Donlan offered the opinion that sarcoidosis, as with all other lung diseases, can be aggravated or flared up by environmental exposures to fumes, dust, or smoke. (Dr. Donlan's Dep. at 13). Dr. Donlan added that aggravation does not occur in patients like Claimant who do not have "lung involvement." (Dr. Donlan's Dep. at 5, 13-14). Given Claimant's lack of "pulmonary symptoms," Dr. Donlan felt that Claimant was fit for any type of employment, including work that involved chemicals or dust. (Dep. at 7-8). Dr. Donlan acknowledged, however, that "[i]t certainly seems as if [Claimant's] symptoms did start with the exposure to the chemical in the grain." (EX 2). Dr. Donlan's October 11, 1999 office notes read: "I would agree that it would be in the patient's best interest not to return to a job with a lot of dust and fumes because of his history of sarcoid and continued symptoms." (EX 2). On October 21, 1999, Dr. Espada expressed that it would not be in Claimant's interest to return to a job with a lot of dust and fumes. (CX 1). On December 8, 1999, noting Claimant's worsening pulmonary and gastrointestinal problems, Dr. Espada opined that Claimant was unable to work since May 1999 and that "he won't be able to work on his previous job that involves a lot of dust and fumes." (CX 1). Dr. Tomlinson also recommended that Claimant avoid dusty environments because of his lung disease. (CX 5).

According to Claimant, Dr. Donlan told him that chemicals could have caused his pulmonary sarcoidosis symptoms to flare up. (Tr. 44). Claimant testified that Dr. Donlan's diagnosis of sarcoidosis was the first point at which Claimant related his symptoms to his employment and

Claimant reportedly stopped work on the advice of Dr. Donlan. (Tr. 44). On September 22, 2000, Claimant filed a claim for compensation based on “pulmonary sarcoidosis” resulting from his exposure to “dangerous chemicals.” (JX 1). On December 20, 2000, Employer filed a first report of injury, describing the accident merely by stating, “Claimant alleges pulmonary sarcoidosis [sic].” (JX 2). On March 9, 2001, Employer filed with the Office of Worker’s Compensation Programs a notice of controversion of right to compensation. (JX 3).

In addition to pulmonary symptoms, Claimant continued to suffer from a variety of gastrointestinal problems. Dr. Espada offered the opinion that Claimant’s sarcoidosis was an “unusual presentation” in that it affected both his respiratory status and his gastrointestinal tract. (CX 1). Also suspecting a relationship between Claimant’s sarcoidosis and his gastrointestinal symptoms, Dr. Donlan referred Claimant to a gastroenterologist. (Dr. Donlan’s Dep. at 6). In April 1999, Dr. Bruce D. Waldholtz, M.D began treating Claimant. (CX 2, CX 2). After a variety of tests, including a barium enema, an endoscopy, a sonogram, and a CT scan, Dr. Waldholtz reported on May 11, 1999 that he could find “no explanation” for Claimant’s symptoms. (CX 2). Dr. Waldholtz consulted with Dr. Donlan concerning Claimant’s condition, however, and eventually accepted Dr. Donlan’s diagnosis of sarcoidosis, finding Claimant’s symptoms to be consistent with this disease. (CX 2).

On March 7, 2000, gastroenterologist Dr. Jacqueline Salsedo began treating Claimant. (CX 3). Claimant primarily complained of abdominal pain and frequent bowel movements. (CX 3). Dr. Salcedo acknowledged Claimant’s diagnosis of pulmonary sarcoidosis, but it became evident that his symptoms were primarily abdominal. (EX 12). Dr. Salcedo found no objective evidence that sarcoidosis was involved in Claimant’s gastrointestinal tract, a manifestation that Dr. Salcedo noted to be rare. (EX 12). Since gastrointestinal sarcoidosis typically affects the liver, Dr. Salcedo ran a series of liver enzyme tests, all of which returned normal. (CX 3, EX 12). In addition, Dr. Salcedo performed an upper endoscopy and a colonoscopy with biopsies. (CX 3). This examination yielded no evidence that there was sarcoid involvement in the stomach or the colon. (EX 12). Dr. Salcedo concluded that Claimant’s symptoms were attributable to irritable bowel syndrome. (CX 2, EX 12). At Employer’s request, Dr. Salcedo provided a written opinion on Claimant’s condition:

The cause of irritable bowel syndrome is unclear, and has not been linked to sarcoidosis in any way I certainly do not know of any links related to irritable bowel syndrome and occupational exposure. I believe that [Claimant] can return to work with his underlying irritable bowel syndrome. He may require frequent bathroom breaks. My impression is that there is no objective evidence to suggest sarcoidosis of the gastrointestinal tract. I believe that his symptoms are attributable to irritable bowel syndrome and he should be able to resume work. I do not believe that his chronic abdominal pain is related to his work environment.

(EX 12). Dr. Salsedo prescribed a variety of gastrointestinal medications including Prilosec, Nexium, Zantac, and Levsin. (CX 3). Dr. Salsedo also restarted Claimant on steroids and recommended that Claimant visit a rheumatologist for his joint pain. (CX 3).

Claimant visited rheumatologist Dr. Albert H. Lee, beginning in March 2000. (CX 5). Dr. Lee prescribed Celebrex and further steroid treatment. (CX 5). On January 12, 2001, Dr. Lee concluded

that Claimant's sarcoidosis was less active and that his joint problems were more likely due to a new problem of secondary fibromyalgia. (CX 5). By February 22, 2001, Dr. Lee considered fibromyalgia to be the cause of most of Claimant's problems. (CX 5). On March 30, 2001, Dr. Lee noted that Claimant's sarcoidosis continued to bother him, but that his main rheumatologic problem at the time was fibromyalgia. (CX 5). Dr. Lee concluded that steroid treatment was no longer necessary for his joints or his breathing problems and he discontinued the treatment. (CX 5).

Based on these continuing medical problems, Claimant did not believe that he was capable of performing his regular work with Employer. (Tr. 38). At the hearing, Claimant expressed that he would have difficulty working in the dust, sitting on the tractor, walking down to the barges, and climbing up and down on the barges. (Tr. 38). Claimant also stated that it would be difficult for him to take the frequent bathroom breaks required with his condition. (Tr. 39). Claimant stated that he sometimes needs immediate access to a bathroom, but that it could take almost an hour to make a trip to the bathroom if working on a barge. (Tr. 39).

On October 12, 2001, at Employer's request, certified rehabilitation counselor Barbara K. Byers prepared a vocational rehabilitation report on Claimant. (EX 10). Ms. Byers reviewed the medical records of Dr. Lee, Dr. Salcedo, Dr. Tomlinson, Dr. Patel, Dr. Donlan, Dr. Waldholtz, and Dr. Espada. (EX 10). Based on these records, Ms. Byers classified Claimant as physically restricted only from performing work in an environment containing "dust or fumes." (EX 10). Ms. Byers considered Claimant's complete educational background, his military service, criminal record, and work history. (EX 10). In addition, Ms. Byers administered a vocational test and evaluated Claimant's additional vocational assets. (EX 10).

After considering these factors, Ms. Byers conducted a labor market survey that described available jobs that would be suitable for Claimant. (EX 10). These jobs had the following titles: "Pizza Delivery Driver," "Mailroom Attendant," "Customer Service Representative," "Meter Monitor," "Marketing Demonstrator," "Retail Supervisor," "PM Route Driver," "Van Driver," and "Stock Inventory Assistant I." (EX 10). None of these positions required exposure to dust or fumes. (EX 10). Neither did any of these positions require skills or education beyond that of Claimant. (EX 10). These positions provided starting salaries ranging from 18,000 dollars to 25,000 dollars per year, and starting wages ranging from seven dollars per hour to nine dollars per hour. (EX 10).

Dr. Salcedo reviewed the job description of each of these positions. (EX 10). The record indicates that Dr. Salcedo approved of full time work for at least four of these positions, adding a modification concerning Claimant's gastrointestinal symptoms. (EX 10). Specifically, Dr. Salcedo noted that Claimant's "irritable bowel symptoms," including nausea and vomiting, might limit Claimant's "ability to work." (EX 10).

Ms. Byers sent three letters to Claimant describing available work. (EX 10). The letters each listed three positions with the appropriate contact information. (EX 10). Although Claimant received these letters, he did not feel he was capable of performing the jobs because of his symptoms. (Tr. 52).

According to Ms. Byers, Claimant applied only for the P.M. Route Driver position. (EX 10).

Analysis

Claimant seeks temporary total disability compensation from May 4, 1999 to the present and continuing. There are three issues presented. First, whether the claim is timely. Second, whether Claimant's injury is work-related. Third, whether Claimant is totally disabled. After a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and precedent, I hold that Claimant has presented a timely claim for compensation and that his injury is work-related. Although I find that Claimant is not totally disabled, I also find that he has suffered a loss of wage earning capacity, and is thus entitled to temporary partial disability compensation.

A. Timeliness

The first issue is whether Claimant filed a timely claim. The one year statute of limitations is tolled if an employer is aware of a work-related injury and fails to file a report of injury. Since Employer was aware of Claimant's injury, and Claimant filed his claim prior to the date Employer filed a report of injury, the claim was timely.

Section 13(a) of the Act sets forth a one year statute of limitations that begins on the date of the injury.⁹ Section 30(f) of the Act, however, provides that the statute of limitations may be tolled until the date the employer files a report of injury. See *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15, 17 (1999); *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277, 282 (1992); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65, 70 (1990).¹⁰

⁹Section 13(a) provides in pertinent part: "Except as otherwise provided in this section, the right to compensation for disability or death under the Act shall be barred unless a claim therefor is filed within one year after the injury or death." 33 U.S.C. § 913(a)(1988).

¹⁰ Section 30(f) provides:

Where the employer or the carrier has been given notice or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of any employee and fails, neglects, or refuses to file report thereof as required by the provision of subdivision (a) of the section, the limitations in subdivision (a) of section 13 of this Act shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provision so subdivision (a) of this section.

In the absence of evidence to the contrary, Section 20(b) of the Act creates a presumption that the filing of the claim was timely. *See* 33 U.S.C. § 920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Company*, 23 BRBS 140,145 (1989). Where failure to file a report of injury tolls the statute of limitations, the employer may overcome the Section 20(b) presumption by proving that it did not know that the injury was work-related. *See Bustillo*, 33 BRBS at 17-18 (1999); *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 217 (1991). Knowledge that the injury was work-related may be imputed where the employer “knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation is warranted.” *See Bustillo*, 33 BRBS at 18; *Steed*, 25 BRBS at 217; *Kullick v. Continental Baking Corp.*, 19 BRBS 115, 118-19 (1986).

Claimant’s chemical exposure of December 23, 1998 set off three different alarms on Employer’s air monitors. This incident was sufficiently serious to alert a reasonable person to possible claims for compensation. Upon evacuating the grain tank, Claimant immediately vomited and his fellow crew members complained of physical symptoms. Claimant’s immediate vomiting should have made Employer aware of Claimant’s injury. Claimant’s foreman, aware of the crew’s exposure, ordered Claimant and his crew members to leave the area and cease working for the remainder of their shift. Given the degree to which Claimant and his crew members were exposed to potentially dangerous chemicals, further investigation of the accident was certainly warranted. Employer is imputed with knowledge, therefore, that Claimant’s injury was work-related.

Despite knowledge of a work-related injury, Employer failed to file a report of injury until December 20, 2000. Section 30(f) requires that the statute of limitations be tolled until this date. Since Claimant filed his claim prior to December 20, 2000, the claim was timely.

B. Work Related Injury

The second issue is whether Claimant’s injury is work-related. Claimant has proven that he suffers from sarcoidosis and that an accident occurred, as well as proving that working conditions existed which could have caused his injury. As such, Claimant has invoked the presumption that his injury is work-related. Employer has failed to rebut this presumption with substantial evidence to the contrary.

33 U.S.C. § 930(f). Section (a), in turn, states:

Within ten days from the date of any injury which causes loss of one or more shifts of work, or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require.

33 U.S.C. § 930(a). *See also*, 20 C.F.R. §§ 702.201-205.

Section 20(a) of the Act creates a presumption that, in the absence of substantial evidence to the contrary, an injury is work-related. See *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982); *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601, 602 (1982). To benefit from this presumption, a claimant need not affirmatively establish a causal connection between work and the injury. See *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Instead, a claimant must prove the two elements of a *prima facie* case for compensation: (1) that the claimant sustained physical harm; and (2) that an accident occurred or that working conditions existed which could have caused the harm. See *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 331 (1981).

Claimant has proven that he sustained physical harm. Immediately following his work exposure to pesticides, Claimant vomited and felt sick. Claimant continued to suffer from a variety of serious symptoms over the following months, including shortness of breath, vomiting, nausea, and loss of appetite. Based on Claimant's pulmonary symptoms, his doctors performed a series of diagnostic tests on Claimant's lungs. The tests revealed objective lung abnormalities that led to Dr. Donlan's diagnosis of sarcoidosis. No doctor has disputed this diagnosis.

Claimant has also proven that an accident occurred. On December 23, 1998, Claimant was exposed to high levels of pesticides, resulting in immediate symptoms. Prior to this date, Claimant had been in good health. After this date, Claimant suffered from sarcoidosis related pulmonary symptoms. Dr. Donlan acknowledged that "[i]t certainly seems as if [Claimant's] symptoms did start with the exposure to the chemical in the grain." (EX 2).

As an alternative to proving that an accident occurred, Claimant has also proven that working conditions existed which could have caused this harm. In proving this point, a claimant's theory as to how the injury occurred must go beyond "mere fancy." *Sinclair v. United Food and Commercial Workers*, 23 BRBS 148, 152 (1989); *Wheatley v. Alder*, 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused the harm. See *Sinclair*, 23 BRBS at 152. Rather, a claimant must show only the existence of working conditions "which could *conceivably* cause the harm alleged." *Id.* (emphasis added).

This standard eliminates the impossible task of affirmatively proving the unknown or complex causes of certain injuries. This is such an injury. Despite rigorous scientific investigation, the precise cause of sarcoidosis has yet to be identified. At the same time, however, numerous studies have focused on the effects of environmental agents on genetically predisposed patients, and research continues to focus in that direction. It is therefore conceivable that grain dust or exposure to high levels of a chemical pesticide could give rise to sarcoidosis in a genetically predisposed patient, and Claimant may be genetically predisposed since he is African-American and has an uncle with sarcoidosis. The etiology of sarcoidosis largely remains a mystery, but Claimant's theory of causation lies within the working theory of the scientific community. Discounting Claimant's theory as mere fancy would be to reject the very theory of scientists studying the disease.

A similar theory, moreover, has been accepted by the Benefits Review Board. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982).¹¹ In *Stevens*, the claimant was exposed to high concentrations of industrial dust and was later unable to work due to the combined effects of sarcoidosis and industrial bronchitis. *See id.* at 628. The Board concluded that the administrative law judge had properly invoked the Section 20(a) presumption based on the judge's finding that "the medical evidence indisputably establishes that claimant is suffering from the effects of sarcoidosis." *Id.* As in *Stevens*, the medical evidence clearly establishes that Claimant suffered from the effects of sarcoidosis. Claimant, like the claimant in *Stevens*, worked in a potentially dangerous environment for his lungs, including areas with high levels of dust and chemical pesticides.¹²

Claimant has presented sufficient evidence to invoke the Section 20(a) presumption. Once the presumption is invoked, the burden shifts to the employer to present specific and comprehensive evidence to rebut the presumption. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1081 (D.C. Cir.1976), *cert. denied*, 429 U.S. 820 (1976). Employer's evidence must sever the potential connection between the disability and the work environment. *See Hensley v. Washington Metro. Area Transit Authority*, 655 F.2d 264, 267 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982); *Webb v. Corson & Gruman*, 14 BRBS 444, 447 (1981). If the presumption is overcome by the introduction of substantial evidence, the factfinder must evaluate all of the evidence and reach a decision based on the record as a whole. *See Del Vecchio v. Bowers*, 296 U.S. 280, 287 (1935). *See also*, *Swinton*, 554 F.2d at 1081; *Norat v. Universal Terminal & Stevedoring Corp.*, 3 BRBS 151, 155 (1976).

Employer's evidence does not sever the potential connection between Claimant's sarcoidosis and his work environment. An employer cannot rebut the presumption simply by showing that the cause of sarcoidosis is unknown. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626, 628 (1982) (holding that because sarcoidosis "is a disease of unknown etiology" the employer did not present evidence that negated the "potential relationship between sarcoidosis and claimant's industrial exposure."). *See also*, *Champion v. S & M Traylor Brothers*, 690 F.2d 285, 297 (D.C. Cir. 1982) (disagreeing with ALJ finding of substantial evidence that claimant's sarcoidosis was not work-related), *rev'g on other grounds*, 14 BRBS 251 (1981).

¹¹ Within the parties' sixty-six pages of briefs, incredibly this case is not included.

¹² Claimant's medical need to avoid the dust and fumes at his job also supports a finding that his sarcoidosis is work-related. The avoidance of medically contraindicated working conditions supports a finding of disability. *See Bath Iron Works v. White*, 584 F.2d 569, 575 (1st Cir. 1978) (holding that prophylactic avoidance of medically harmful working conditions constitutes sufficient medical foundation for a finding of disability), *aff'g*, 7 BRBS 86 (1997); *Graham-Stevenson v. Frigitemp Marine Division*, 9 BRBS 554, 556 (1978) (finding disability where claimant suffered work-related aggravation of unrelated underlying pulmonary condition); *Chase v. Bethlehem Steel Corp.*, 9 BRBS 143, 147 (1978) (Judge Miller concurring) (upholding finding of disability due to claimant's continued employment in aggravating work environment). Claimant's doctors recommended that Claimant avoid the dust and fumes inherent in his work. This evidence bolsters the connection between Claimant's work environment and his injury.

The science of sarcoidosis has progressed so far as to provide Claimant with a plausible theory of causation, but not so far as to either affirm or negate this theory. The authoritative joint statement on sarcoidosis recognizes the theory that environmental agents might cause sarcoidosis, while acknowledging that no study has yet to confirm or disprove the theory. Accordingly, there is no medical evidence that severs the potential causal connection between Claimant's sarcoidosis and his working conditions. Section 20(a) requires that the benefit of such an incomplete scientific picture belong to Claimant. Employer has thus failed to present substantial evidence to rebut the Section 20 (a) presumption, and consequently, Claimant's injury is work-related.

Nevertheless, Claimant's work-related injury is limited to a pulmonary manifestation of sarcoidosis. In defining the disability, it is the claimant that has the burden of proving the nature and extent of his injury. *See Brocato v. Universal Maritime Service Corp.*, 9 BRBS 1073, 1074 (1978). The medical evidence rules out any connection between sarcoidosis and Claimant's gastrointestinal symptoms. Dr. Salcedo found no objective evidence of sarcoidosis involvement in Claimant's gastrointestinal tract, concluding instead that Claimant suffered from unrelated irritable bowel syndrome. Dr. Salcedo offered a clear opinion that Claimant's gastrointestinal symptoms were not related to Claimant's work environment or occupational exposure and the record contains no contrary medical opinion. Similarly, Claimant has failed to prove that his joint problems are disabling. Dr. Lee opined that Claimant's symptoms were more likely due to fibromyalgia. Furthermore, no evidence indicates that joint pain affected Claimant's ability to perform his work duties or in any other way limited his wage earning capacity.

C. Total Disability

Claimant seeks compensation for temporary total disability resulting from his sarcoidosis. Claimant has proven that he is incapable of performing his regular work with Employer. Employer, however, has shown the availability of suitable alternate employment and a corresponding wage earning capacity. Consequently, Claimant is entitled to compensation only for partial disability.

1. *Ability to perform regular employment.*

The Act sets forth a scheme for compensating a work-related disability, defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). In a claim for total disability benefits, the claimant has the initial burden of showing that he is totally unable to perform his usual employment. *See Hunigman v. Sun Shipbuilding and Dry Dock Co.*, 8 BRBS 141, 145 (1978).

There is no dispute that Claimant's usual work environment contains a large amount of dust and fumes. Nor is there a dispute that Claimant suffers from pulmonary sarcoidosis with objectively

verifiable abnormalities in his lungs. Claimant has complained of pulmonary symptoms since the time of his exposure, including shortness of breath, wheezing, and coughing. At various points during treatment of Claimant's pulmonary symptoms, Dr. Donlan, Dr. Espada, and Dr. Tomlinson have each recommended that he avoid working in a dusty environment. While Dr. Patel noted Claimant's mildly abnormal pulmonary function tests in 2000 and declined to continue steroid treatments, at no time did Dr. Patel state that Claimant was well enough to return to a dusty work environment. Though Dr. Donlan remarked in his deposition that Claimant's lung condition would not restrict him from working around chemicals and dust, this comment is not credible as it stands in sharp contrast to the bulk of medical evidence and contradicts Dr. Donlan's other statements in the record. The weight of the remaining evidence clearly indicates that Claimant cannot work around dust and fumes. Consequently, Claimant is totally unable to perform his usual employment at Employer's grain transportation facilities.

2. *Suitable alternate employment*

Once a claimant demonstrates that his injury makes it impossible for him to return to his regular duties, the burden then shifts to the employer to show that suitable alternate employment is available. *See Chappel v. Newport News Shipbuilding and Dry Dock Co.*, 10 BRBS 81, 86 (1978), *aff'd* 592 F.2d 762 (4th Cir. 1979); *Pilkington v. Sun Shipbuilding and Dry Dock Co.*, 9 BRBS 473, 477 (1978). An employer can meet the burden of proving suitable alternate employment by identifying specific jobs in close proximity to the place of injury which are available for the claimant. *See Royce v. Erich Construction Co.*, 17 BRBS 157, 158-59 (1985).

The Fourth Circuit Court of Appeals set forth the applicable standard for establishing job availability in *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (1984). In *Trans-State*, the court held that the employer must identify specific jobs which meet two characteristics. *See id.* at 201. First, the jobs must be ones which the claimant is "capable of performing or capable of being trained to do" given the claimant's "age, background, employment history and experience, and intellectual and physical capacities." *Id.* (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)). Second, the jobs must be ones which the claimant "could realistically and likely secure" such that "he would be hired if he diligently sought the job[s]." *Trans-State*, 731 F.2d at 201 (quoting *Turner*, 661 F.2d at 1042-43). In addition to these characteristics, the Benefits Review Board has held that the employer must establish the precise nature and terms of these jobs, including the appropriate pay scales. *See Riech v. Tracor Marine, Inc.*, 16 BRBS 272, 273 (1984); *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024, 1027 (1978). In identifying these jobs, the administrative law judge may rely on the opinion of a vocational counselor. *See Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985).

Employer has shown several jobs that meet this criteria. Ms. Byers identified ten specific jobs appropriate for Claimant given his skills, age, background, employment history, and his inability to work around dust and fumes. Dr. Salcedo specifically approved of at least four of these positions,

although adding a minor modification for frequent bathroom breaks.¹³ In her labor market survey, Ms. Byers gave a detailed description of each job along with its pay. The lowest pay is at seven dollars per hour. Despite Claimant's need for frequent bathroom breaks, these are jobs that Claimant could likely secure if he were to diligently seek employment.¹⁴

Claimant has not presented evidence to refute the statements of Ms. Byers. In evaluating the credibility of Ms. Byers, however, it should be noted that she is a witness proffered by the Employer. While Ms. Byers includes several higher paying jobs in her report, a thorough examination of Ms. Byers' labor market survey shows that seven dollars per hour is the pay Claimant could most realistically secure. At this rate of pay, Claimant has a wage earning capacity of \$280 per week (seven dollars per hour multiplied by forty hours per week). Claimant's average weekly wage at his job with Employer was \$556.57 per week. Claimant's loss of wage earning capacity is thus \$276.57 per week, resulting in a temporary partial disability compensation rate of \$184.38 per week.

ORDER

It is hereby ORDERED that:

1. Employer Cargill, Inc. shall pay to Claimant Benjamin M. Goode temporary partial disability compensation in the amount of \$184.38 per week beginning May 4, 1999 to the present and continuing.
2. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. *See Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).
3. Pursuant to Section 7 of the Act, Employer shall provide such medical treatment as the nature of Claimant's work-related injury requires. Claimant is entitled to reimbursement for future medical expenses.
4. All computations are subject to verification by the District Director.
5. Claimant's attorney, within thirty (30) days of the receipt of this Decision and Order, shall submit a fully supported fee petition, a copy of which shall be sent to opposing counsel, who then shall have twenty (20) days to respond with objections thereto.

¹³ Dr. Salcedo did not disapprove of any jobs.

¹⁴ Claimant has not diligently sought employment. Based on his own personal belief that he is incapable of working, Claimant applied for only one job since working for Employer.

A
DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/dmj